INDEX

724-904—64——1

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 508

ANDRES LUCAS AND ARCHIE L. LISCO, APPELLANTS

v.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLORADO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (R. 153–190)[1] is reported at 219 F. Supp. 922. A prior opinion of the three-judge district court (R. 31–48) is reported at 208 F. Supp. 471.

JURISDICTION

The judgment of the district court was entered on July 16, 1963 (R. 206). Notices of appeal to this Court were filed by appellant Lucas on August 1,

[1] Since the record is not printed, references are to the original record.

1963 (R. 387–395), and by appellant Lisco on August 16, 1963 (R. 397–409). Probable jurisdiction was noted on December 9, 1963. 375 U.S. 938. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the complaint should have been dismissed for want of equity under all the circumstances, including the fact that a majority of voters in each county approved the present apportionment plan and rejected a plan providing for the apportionment of both houses on the basis of population when other issues were also prominent factors in the vote.

2. Whether the provisions of the Colorado Constitution—which provide for a House of Representatives apportioned substantially in accordance with population but a Senate in which there are serious disparities in *per capita* representation, giving control to a small minority of the people—violate the Equal Protection Clause of the Fourteenth Amendment.

STATUTES INVOLVED

The relevant provisions of the Colorado Constitution and laws are summarized in the statement, pp. 4–5, and set forth in Appendix A, pp. 61–62.

INTEREST OF THE UNITED STATES

This is one of six reapportionment cases pending disposition in which the Court is called upon to formulate under the Fourteenth Amendment constitutional principles applicable to challenges to malapportionment of a State legislature. The Court has

heard argument in the New York, Alabama, Maryland, Virginia, and Delaware cases. The United States filed its principal brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, and there attempted to present a compendious analysis of principles applicable to legislative apportionment. The instant case raises specific problems in the application of those principles.

STATEMENT

1. *The Complaint and Initial Proceedings.* This appeal grows out of two consolidated actions filed in the District Court for the District of Colorado by registered voters and taxpayers resident in Adams, Arapahoe, Denver, and Jefferson Counties, Colorado, in behalf of themselves and all other persons similarly situated, against State officials, challenging the constitutionality under the Fourteenth Amendment of the apportionment of the Colorado legislature pursuant to Article V, Sections 45, 46, and 47 of the Colorado Constitution and Colorado Revised Statutes, Sections 63–1–2, 63–1–3, and 63–1–6 (R. 1–7, 208–222).[2] The sponsors of the current apportionment, which was then to be voted upon in a referendum (proposed Amendment No. 7 to the State Constitution), were permitted to intervene (R. 31–32, 335). After trial before a three-judge court, the district court decided that it had jurisdiction and the issue was justiciable (R. 39); that grounds for abstention were lacking and sovereign immunity was not a defense (R. 40-

[2] In one case the State of Colorado was also named a defendant (R. 1).

41); and that the plaintiffs had made out a *prima facie* case of discrimination which had not been rebutted by the defendants (R. 45–46). The court then continued the cases without further action because of the impending general election in November 1962, at which time the people of Colorado would vote on two initiated constitutional amendments dealing with legislative apportionment (R. 46–48).

Amendment No. 7 was adopted at the election and the prior issues dropped out of the case.

2. *The Adoption of the Current Apportionment.* At the election in November 1962 the people of Colorado voted upon two proposals for reapportionment of the legislature: (a) Amendment No. 7, which was adopted by a vote of 305,700 to 172,725, and (b) Amendment No. 8, which was defeated by a vote of 149,822 to 311,749.

Amendment No. 7 called for the establishment of a General Assembly composed of a Senate of 39 members and a House of 65 members. The Senate would be divided into 39 senatorial districts and 65 representative districts. The legislature was to have the responsibility of creating the House districts "as nearly equal in population as may be." The allocation of senators among the counties was to follow the existing districts and apportionment, "which shall not be repealed or amended other than in numbering districts," except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson, and Lincoln would be formed into one district, and one additional senator would be apportioned to each of the counties of Adams, Arapahoe, Boulder, and Jefferson. Within a county apportioned

more than one senator, senatorial districts would be established by the legislature "as nearly equal in population as may be." Amendment No. 7 also provided that after each Federal Census there should be a revision of representative districts and senatorial districts within counties apportioned more than one senator, so as to conform to the foregoing requirements (R. 180–181; 219 F. Supp. at 933–934).

Amendment No. 8 (see Appendix A, pp. 62–65), on the other hand, proposed to create a three-man commission to apportion both houses of the legislature periodically. The commission would have the duty of delineating senatorial and representative districts and revising and adjusting the apportionment of senators and representatives among such districts (R. 182). Its decisions would be reviewable by the Colorado Supreme Court. The commission would be required to determine a strict population ratio for both the Senate and the House by dividing the total State population as set forth in each decennial United States Census by the number of seats assigned to the Senate and House, respectively. No legislative district should contain a population per senator or representative of 33⅓ percent more or less than the strict population ratio, except certain mountainous senatorial districts of more than 5,500 square miles, but no such senatorial district was to contain a population of less than 50 percent of the strict population ratio (R. 183). Senatorial districts should consist of one county or two or more contiguous counties, but no county should be divided in the formation of a senatorial district. Representative districts should consist of one county or two or more

contiguous counties. Any county apportioned two or more representatives could be divided into representative subdistricts but only after a majority of the voters in the county had approved, in a general election, the exact method of subdivision and the exact apportionment of representatives among the subdistricts and the county at large. A proposal to divide a county into subdistricts could be placed on the ballot only by initiative petition in accordance with State law, and only at the general elections of 1966, 1974, and at the general election held each ten years thereafter (R. 183–184; 219 F. Supp. at 934–935).

The voters approved Amendment No. 7 and defeated No. 8 by substantial majorities in every county R. 76–78).

3. *Trial Proceeding Following the Adoption of Amendment No. 7.* After the 1962 election the pleadings were amended to convert the case into a test of the constitutionality of the apportionment under Amendment No. 7 (R. 51–54, 372–381). Plaintiffs requested a declaration that Amendment No. 7 was unconstitutional under the Fourteenth Amendment and a decree reapportioning the legislature on the basis of population (R. 54, 380–381).

In May 1963 the case went to trial (R. 465). The court ordered that all proceedings theretofore had in the case, "including all testimony, evidence, and exhibits, and the transcript and record thereof be made a part of the * * * trial proceedings" (R. 116).

The defendants introduced exhibits which showed the history of legislative apportionment in Colorado. Since the adoption of the Colorado Constitu-

tion in 1876, the General Assembly of Colorado has been reapportioned or redistricted on the following occasions: 1881, 1891, 1901, 1909, 1913, 1932, 1953 (Def. Ex. E-E 6), and, with the adoption of Amendment No. 7, in 1962.[3] The 1932 measure was an initiated act, adopted because the General Assembly had neglected to perform its duty under the State constitution. In 1933 the General Assembly attempted to thwart the initiated measure by adopting its own legislative reapportionment Act, but the latter measure was held unconstitutional. See *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757.

The 1953 apportionment (see Appendix A, pp. 65–67), which was in effect immediately prior to Amendment No. 7, is important because it established the foundation for the present apportionment of the State Senate. The controlling statute fixed the number of senators at 35 and established 25 fixed senatorial districts, composed of one or more whole counties. 1953 Colo. Rev. Stat. 63–1–1, 63–1–3. Senators were to be apportioned among the districts, one for the first 19,000 of population and one for each additional 50,000 or fraction over 48,000. Between 1950 and 1960 the population of Colorado's urban areas increased 55.5 percent and the population of the rural areas decreased 6.6 percent (R. 291). The original formula for apportioning the Senate, plus the tremendous shifts in population, gave rise to gross disparities in *per capita* representation. For example, by 1960 Jefferson County with 127,520 residents was represented by only one senator while the

[3] Minor revisions involving only a few counties are not included in the above list (R. 480–481).

smallest senatorial district, the Eighteenth District, with a population of 17,481, had the same representation—a disparity of more than 7 to 1 (Pl. Ex. 8). Nineteen of the 35 senators—more than a majority—came from districts containing only 556,912 people whereas 1,207,035 residents of the more populous districts elected only 16 Senators (Pl. Ex. 5).

Since the current apportionment of the lower house achieves equal *per capita* distribution of representatives among the several counties, there is no need to consider the details. The current apportionment of the Senate is based upon the 1953 apportionment. Amendment No. 7, as explained above, split Elbert County from Arapahoe and put it in one district with Lincoln, Kit Carson, Cheyenne, and Kiowa Counties. It then created four new senate seats, bringing the total membership to 39, and gave one additional senator each to Adams, Arapahoe, Boulder, and Jefferson Counties. Plaintiffs introduced elaborate statistical evidence showing the resulting *per capita* representation of the several Senate districts both individually and in typical groups. Since the comparisons are chiefly matters of argument, we reproduce here only the 1960 populations of the various districts, together with the percent of the ideal ratio represented by the senator or senators from each district:*

* The figures here and elsewhere in this brief are computed from the basic statistics set forth in Appendix C to the opinion of the district court (R. 186–190). The most convenient maps are inside the front and back covers of the Report of the Denver Research Institute, a separate volume introduced into evidence, a copy of which has been furnished to the Court.

Districts	Counties	Population	Senators	Population Per Senator	Percent of Ideal Representation
	WESTERN REGION				
26	Chaffee, *et al.*	20,909	1	20,909	215
25	Fremont, Custer	21,501	1	21,501	209
27	Delta, *et al.*	21,287	1	21,287	211
29	Rio Blanco, *et al.*	23,426	1	23,426	192
32	Mesa	50,715	1	50,715	89
33	Montrose *et al.*	25,027	1	25,027	180
36	San Juan, *et al.*	36,727	1	36,727	122
37	Garfield, *et al.*	28,249	1	28,249	159
	EASTERN REGION				
28	Logan, *et al.*	28,984	1	28,984	155
34	Kit Carson, *et al.*	21,189	1	21,189	212
36	Yuma, *et al.*	36,729	1	36,729	122
38	Otero, Crowley	28,106	1	28,106	160
39	Bent, *et al.*	27,025	1	27,025	166
	SOUTH CENTRAL REGION				
23	Las Animas	19,983	1	19,983	225
30	Huerfano, *et al.*	22,086	1	22,086	204
31	Saguache, *et al.*	24,485	1	24,485	184
	EAST SLOPE REGION				
1-8	Denver	493,887	8	61,736	73
9-10	Pueblo	118,707	2	59,353	76
11-12	El Paso	143,742	2	71,871	63
13-14	Boulder	74,254	2	37,127	121
15-16	Weld	72,344	2	36,172	124
21-22	Jefferson	127,520	2	63,760	71
26	Larimer	53,343	1	53,343	84
19-20	Arapahoe	113,426	2	56,713	79
17-18	Adams	120,296	2	60,148	75

The defendants and intervenors introduced evidence concerning the history, geographic features, and economic interests of Colorado in order to demonstrate that the apportionment provided by Amendment No. 7 had a rational basis. One of their principal items of evidence was a report, prepared by the Denver Re-

search Institute, entitled "Economic Analysis of State Senatorial Districts in Colorado" (Def. Ex. D), which described the economic and geographic character of each senatorial district. The report contains considerable useful information, including maps. Two of the four witnesses who testified for the defendants (John G. Welles and Dean C. Coddington) supervised the preparation of the Report (R. 546, 549), and explained it on the witness stand (R. 543–579). A third, John P. Lawson, a retired professor of political science, testified generally with respect to the derivation of the bicameral legislature (R. 579–615); he stated that, without being reflected in the State constitutions, the State senates in this country historically had represented economic interests and were less closely tied to the people than the lower houses (R. 585–587), and that Amendment No. 7 was consistent with that history (R. 588).

The fourth witness, James Grafton Rogers, testified as an expert on the government, history, economics, topography, and geography of Colorado (R. 469–476). Mr. Rogers stated that the mountain ranges in the western part of the State had caused problems of communication (R. 476). He testified that throughout Colorado history there had been an effort to take into consideration area and economic interests, as well as population, in the Colorado Senate (R. 483–484). He said that the legislature had historically tried to join counties with a common economic and social interest "in a fashion in which a representative or a senator was able to reach his people" and tried to avoid including large and small counties in the same district

because of fear that the latter would be disregarded (R. 488–489). Mr. Rogers produced maps (Def. Ex. E–E6) showing the apportionment of the State Senate through Colorado's history (R. 480). Mr. Rogers concluded that the apportionment in Amendment No. 7 was rationally based on historical, economic, social, and geographic factors (R. 489). On cross-examination, he was unable to give any formula by which it could be determined how much representation each of the varying interests in Colorado should be given (R. 499–500). He argued that heavily populated areas were dangerous if given equal representation "because the cities from their very fact of population could organize in a way in which they had much greater strength. They were subject to political machines, subject to the activities of chambers of commerce and various other organizations, elements which were not applicable to rural areas * * *" (R. 503–504). Mr. Rogers noted that a major issue in Colorado was the division of water between the eastern and western slopes of the Rocky Mountains, and said that Amendment No. 7 was designed to reflect these different interests (R. 518–522).

The intervenors put on two witnesses. Joseph F. Little testified with respect to the factors which motivated the group sponsoring Amendment No. 7. He stated that they had wanted, *inter alia*, to provide for districting within populous counties (R. 622–623); to take Colorado topography, with its problems of accessibility and its natural boundaries, into account (R. 623, 640); to balance the advantages which Den-

ver and other home rule cities enjoyed[5] (R. 623–624); to provide for homogeneity in language within districts in Spanish-speaking areas (R. 624), and to take account of the fact that in certain counties (such as El Paso, which contains the Air Force Academy) the population as computed by the census includes a large number of persons who are transients and do not vote, and that in other counties, with declining industry and business, resident population is less than the voting population, since many absentee ballots are cast.[6] Mr. Little also testified that a legislature "should number among its members not only experts but also those who have practical experience in such matters as water, agriculture, stock raising, the tourist industry, lumbering, mining and all the other various pursuits * * * in the State of Colorado" (R. 648–649).

The second witness produced by the intervenors was Edwin C. Johnson, three-term Governor and three-term United States Senator from Colorado (R. 434),

[5] Mr. Little asserted that the legislature was not as important to the County of Denver because it was a home rule city which originated much of the legislation which ordinarily would come from the legislature (R. 644). A tabulation of Colorado Home Rule Cities and their populations is contained in Intervenors' Ex. E.

[6] Thus, for example, El Paso County, with a total population of 143,742, has 56,501 registered voters—a percentage of aproximately 39 percent. Gilpin County, with a population of 685, has 720 registered voters (105 percent), and Hinsdale, with 208 people, has 280 registered voters (135 percent). (Intervenors' Ex. D). Denver has a percentage of registered voters, 52 percent (259,039 registered voters out of 493,887 population), exceeding the statewide average, which is 50 percent. All these figures are taken from Intervenors' Ex. D.

who, like Mr. Little, was one of the sponsors of Amendment No. 7. Besides testifying, he submitted an affidavit in which he elaborated upon his prior testimony (R. 138). In that affidavit, Mr. Johnson asserted that the issues in the November 1962 election were very clearly defined as the result of organized campaigns on behalf of both Amendments 7 and 8 and widespread newspaper publicity (R. 142). He warned of the dangers of an urban-dominated legislature (R. 144). He said that Amendment No. 7 was designed to balance the power of Denver and the surrounding suburban counties—which had been fighting over bills to give Denver authority to annex neighboring areas—by giving each side eight Senate seats (R. 145–146). And he cited the importance of an effective voice for each of the various interests in Colorado so that its resources could be developed (R. 146–149).

4. *The Decision of the District Court.* The three-judge court divided 2–1 in sustaining the validity of the senate apportionment (Circuit Judge Breitenstein and District Judge Arraj in the majority; District Judge Doyle dissenting). In dismissing the complaints, the court first held that the Fourteenth Amendment does not require "equality of population within representation districts for each house of a bicameral state legislature" (R. 163; 219 F. Supp. at 927). The court then inquired whether the deviation from *per capita* representation in the state senate was "rational" or "invidiously discriminatory" (R. 166; 219 F. Supp. at 928). After appraising each element in some detail, it then concluded that the

geographic diversities and economic groupings, the historic derivation of the districts, and the "accessibility of a condidate to the voters and of a senator to his constituents" gave the apportionment a rational basis (R. 176; 219 F. Supp. at 932). The court also stressed the fact that the apportionment had been adopted by popular vote in a recent Statewide referendum. "The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behaviour of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary" (R. 178; 219 F. Supp. at 932).

Judge Doyle dissented upon two grounds. First, he concluded that "until there is some authoritative ruling to the contrary we must assume that equality of voting power is demanded with respect to both houses" (R. 195; 219 F. Supp. at 941). Second, he urged that the disparities in *per capita* representation in the State Senate could not be rationalized. History, he reasoned, was irrelevant; while it might explain, it could not justify. The geographic, topographic, and economic differences in the several parts of the State were not the basis of the apportionment. The geographic factor carried little weight in the light of modern methods of travel and communication. Economic interests changed too rapidly and were not entitled to a built-in priority. Both the popular adoption of the apportionment and opportunities for change by initiative and referendum were irrelevant because plaintiffs were en-

titled to judicial protection of what are personal constitutional rights.

SUMMARY OF ARGUMENT

I

The complaint should not be dismissed as an exercise of the equitable discretion to remit a plaintiff to other remedies where intervention would be inconsistent with a larger public interest. Save under the most extraordinary circumstances, the federal courts have a clear duty to adjudicate and enforce claims of unconstitutional discrimination resulting from malapportionment. Cf. *Wesberry* v. *Sanders*, No. 22, this Term, decided February 17, 1964.

The bare fact that an apportionment has been recently adopted by a majority of the people is not a circumstance that will justify dismissal for want of equity. "No plebiscite can legalize an unjust discrimination." *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 659 (E.D. La.), affirmed, 368 U.S. 515. The precept is normally applicable to discrimination affecting the value of a vote. Proof that a majority of the people have approved a particular apportionment resulting in *per capita* inequalities is usually insufficient to show acquiescence by all the classes prejudiced by the allegedly discriminatory classification, partly because they can rarely be separated out of the totals and partly because the significance of the vote may be clouded by cross-currents stirred by other consequences of the particular measure upon which the referendum was held. For similar reasons the opportunity to secure reapportionment by constitutional convention

or initiative and referendum is not an adequate reason for withholding equitable relief.

In the present case, however, appellees are able to make a unique plea for withholding equitable intervention. Proposed Amendment No. 7, which established the present apportionment, was approved by a majority of the voters in every Colorado county. In these circumstances there is great force to the argument that the *per capita* inequities have been approved by a majority of the members of each class alleged to suffer from unjust discrimination, for the classification of which appellants complain is the classification of voters by county for diverse *per capita* representation. Ordinarily, constitutional rights, being personal, do not depend even upon the will of a majority of the victims, but the right to equal representation is peculiar insofar as it cannot be enjoyed by individual members of the class without forcing it upon the majority favoring the challenged apportionment.

With the other factors closely balanced, the issue turns upon the character and extent of the alleged injury. In previous cases the United States has assumed *arguendo* that the Equal Protection Clause leaves room for accommodating, within limits, the principle of *per capita* equality and other non-invidious and relevant objectives of the electoral and representative process. The Government then advanced, among other principles, the proposition that disparities in *per capita* representation may be so gross in relation to any otherwise permissible objectives of the classification as to be arbitrary and capricious under settled constitutional principles. The

validity of that proposition will be determined in other pending apportionment cases. Insofar as appellants' challenge to the Colorado apportionment depends upon it, the Court should also determine the merits of the present controversy. However close the case may be as a matter of degree, this challenge breaks no new constitutional ground. Essentially the same kind of question of degree would have to be decided, even though the line might be drawn at a different point, in determining whether plaintiffs' injury, if any, was sufficient to warrant equitable relief.

On the other hand, if appellants cannot succeed without breaking new ground and obtaining a decision upon whether the Fourteenth Amendment requires that the seats in both houses of a State legislature be apportioned as nearly in proportion to population as practicable, their claim raises a novel and very difficult question, and the injury, if any, is necessarily small. Weighing this factor along with the peculiar circumstances discussed above, we suggest that the Court might wish to dismiss any such challenge without deciding its merits.

II

The inequalities in *per capita* representation in the Colorado legislature as a result of the discrimination against populous counties in the Senate are so serious as to deny appellants equal protection of the law. The fact that seats in the House are apportioned *per capita* does not excuse arbitrary and capricious discrimination in apportioning representation in the

Senate. The supposed federal analogy is inapposite not only because it resulted from a compromise between the claims of popular representation and theories of State sovereignty that have never been applicable to the governmental subdivisions of a single State, but also because there is no basis for a claim that Colorado's counties are represented as such in the upper branch of her legislature. The equality of representation in the House is constitutionally relevant, however, both because it results in more nearly equal representation in the total legislative process than plaintiffs are permitted in the Senate and also because it prevents a minority of the people from enacting legislation opposed by the majority.

The over-all discrimination in *per capita* representation resulting from the malapportionment of the Colorado Senate has no rational relation to permissible objectives of legislative apportionment. Such bases for discrimination as the desire to balance the voting power of the three metropolitan areas, to weight the representation of the State's diverse economic interests, and to balance the voting power of the counties with excess supplies of water against the water-hungry regions are not only irrelevant but invidious. Differentiations or classifications among voters whose function is to give one group more *per capita* representation than another are the antithesis of equality before the law.

The permissible objectives relied upon by appellees and the district court, such as the desire to avoid splitting counties and enable senators to keep in close touch with their constituents, could be substantially

achieved without creating the gross inequalities found under the current apportionment. In addition, the court below erred in giving too much weight to the objectives and too little to the value of the right to vote.

The present case is admittedly closer than those which preceded it; both because the Colorado House, unlike the lower branch in any of the other cases, is apportioned as nearly as practicable in accordance with population, and because the discrimination in *per capita* representation in the Senate is less than Maryland, Alabama, and Delaware, and also less than in New York if both branches are taken into account. In the Government's view, however, it should be decisive: (1) that the discrimination is so great as to give 75 percent of the voters, living in the eastern slope region, less than half the *per capita* representation in the Colorado Senate which it grants the 25 percent of the voters living in other regions, and permits counties containing less than one-third of the people to elect a numerical majority of the Senate; (2) that the trend of population growth is constantly increasing the discrimination; and (3) that the only relevant and non-invidious objectives could be substantially achieved without so much discrimination.

ARGUMENT

INTRODUCTION

This is the sixth case to come before the Court at the present Term involving a challenge to the apportionment of seats in a State legislature. The basic principles which the United States believes should

control the application of the Equal Protection Clause to State legislative apportionments now before the Court are analyzed in our briefs in the previous cases. See especially Briefs for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, and *Roman* v. *Sincock*, No. 307, this Term. We rest upon the same principles here. While recognizing that the issue is far more closely balanced than in the other cases, the United States takes the position that the judgment below should be reversed because the Colorado apportionment, although partly based upon permissible criteria, subordinates the principle of popular representation to other considerations to such a degree as to create serious inequalities in the representation of voters and give a veto in the legislature to a small minority of the people.

The dominant fact, in our view, is that the Colorado apportionment is so discriminatory as to give a majority of the seats in the State Senate to the voters in counties containing less than one-third of the population. The inequalities in *per capita* representation between overrepresented and underrepresented counties run as high as 3.6 to 1. The more populous and growing areas in which 66 percent of the people reside are allowed to elect only a bare majority of the State senators. The justifications advanced for this discrimination, so far as relevant, are inadequate.

Nevertheless, the present controversy differs from the prior cases in two important respects:

(1) The Colorado apportionment is an up-to-date apportionment adopted as a constitutional amendment

in 1962 in a popular referendum in which not only a large majority of all the voters but a majority in each county voted for the present apportionment in preference to an alternative proposal providing equal representation *per capita.*

(2) Seats in the House of Representatives are allocated in proportion to population and the discrimination, taking the legislature as a whole, is much less severe than that involved in the other five cases awaiting decision.

Since we do not ask the Court now to hold that seats in both houses of a bicameral legislature must be allocated as closely as practicable in accordance with population, the two issues that we deem critical result from the foregoing factual differences between this controversy and the earlier cases. They are:

(1) Should a court of equity stay its hand and leave plaintiffs to any other remedies on the ground that under all the circumstances, including the recent approval of the apportionment by a majority of the classes which plaintiffs claim to represent, the intervention of a court of equity would not be in the public interest?

(2) Does the unequal apportionment of seats in the Colorado Senate, measured *per capita,* create discrimination so gross, and give control to a minority so small, that, notwithstanding the justifications offered, it involves a denial of equal protection?

Since the latter question calls only for the application of principles that we believe will be settled in the other reapportionment cases now pending, we

urge that the Court should also reach the merits here and hold the present Colorado apportionment unconstitutional. However, if the Court rejects our view that the Colorado apportionment strikes an unreasonable balance, we suggest that the bill might be dismissed for want of equity without reaching further and more difficult constitutional questions.

I

THE COMPLAINT SHOULD NOT BE DISMISSED AS A MATTER OF EQUITABLE DISCRETION

It is a familiar principle that, since the power of a court of equity to act is in some measure discretionary, the court may stay its hand, without adjudicating the merits, when intervention would be contrary to the public interest, thus leaving the complainants to any other avenues of redress. See *United States* v. *Dern*, 289 U.S. 352, 359–360; *Pennsylvania* v. *Williams*, 294 U.S. 176, 185; *A.F. of L.* v. *Watson*, 327 U.S. 582, 593. The principle has been invoked in apportionment cases although never explicitly applied by a majority of the Court. See *Wood* v. *Broom*, 287 U.S. 1, 8–9 (dissenting opinion of Justices Brandeis, Stone, Roberts, and Cardozo); *Colegrove* v. *Green*, 328 U.S. 549, 564–566 (Mr. Justice Rutledge concurring); *MacDougall* v. *Green*, 335 U.S. 281, 284–287 (Mr. Justice Rutledge concurring). See also the opinion of Mr. Justice Clark concurring in *Baker* v. *Carr*, 369 U.S. 186, 258–259.

A federal court must normally exercise its jurisdiction to adjudicate and protect the constitutional right to equal protection of the laws in the allocation

of seats in a State legislature. Controversies over the constitutionality of congressional districting and legislative apportionment are justiciable. *Baker* v. *Carr*, 369 U.S. 186; *Wesberry* v. *Sanders*, No. 22, decided February 17, 1964. The jurisdiction is one that a court must exercise save under truly exceptional circumstances. *Baker* v. *Carr* points strongly in that direction, although the point was not squarely before the Court. *Wesberry* v. *Sanders* holds that "want of equity" is not a substitute for "non-justiciability," and that the delicacy of judicial supervision of political processes is not sufficient reason for withholding equitable protection for a constitutional right. Furthermore, the public interest is usually served best by a vigorous enforcement of constitutional rights. It has not been argued in any of the five preceding reapportionment cases that the bill should be dismissed in the exercise of equitable discretion. Had the argument been made, we would have urged that it be rejected as summarily as in *Wesberry* v. *Sanders*.

Manifestly, the fact that an apportionment is adopted in a popular referendum is not enough to sustain its constitutionality or to induce equity to stay its hand. Constitutional safeguards are for the protection of minorities. "No plebiscite can legalize an unjust discrimination." *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 659 (E.D. La.), affirmed, 368 U.S. 515. "One's right to life, liberty, and property * * * and other fundamental rights may not be submitted to vote; they depend on the out-

come of no elections." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638. In *Moss* v. *Burkhart*, 207 F. Supp. 885, 894 (W.D. Okla.), appeal dismissed, 374 U.S. 103, a three-judge district court, although noting the pendency of an initiative petition which would have transferred enforcement of the apportionment formula in the Oklahoma Constitution from the legislature to a Commission, nonetheless held the apportionment of seats in the legislature unconstitutional, stating that "* * * the right asserted * * * cannot be made to depend upon the will of the majority." Accord, *Thigpen* v. *Meyers*, 211 F. Supp. 826, 832 (W.D. Wash.), pending on appeal, No. 381, this Term; *League of Nebraska Municipalities* v. *Marsh*, 209 F. Supp. 189, 192–193 (D. Neb.).

The foregoing principle seems plainly applicable whenever the challenge is to a crazy-quilt pattern of representation; it is no answer to the victims of capricious discrimination to say that the majority is content. *A fortiori*, relief against an apportionment like that in Virginia, which, either by accident or design, invidiously discriminates against the people of three localities, could not be withheld because a majority of the people of the State favored the discrimination. See Brief for the United States in *Davis* v. *Mann*, No. 69, this Term, pp. 30–33. The case is the same whenever the deviation from normal principles of popular representation is based upon impermissible grounds. See Brief for the United States in *WMCA, Inc.* v. *Simon*, No. 20, this Term, p. 28.

The instant case, however, presents a unique circumstance, not found in any other case coming to our attention, which argues more strongly for invoking the doctrine that equity may stay its hand when the

public interest requires, leaving the complainants to any other available remedies. The present Colorado apportionment was adopted after prolonged consideration. Apportionment has been an issue in Colorado since 1954. Proposed reapportionment measures were before the voters in 1954 and 1956 as well as 1962. This is not a case in which the problems of fair representation have been neglected or the channels for expressing the popular will have been closed. Cf. *Baker* v. *Carr*, 369 U.S. 186, 259 (Mr. Justice Clark concurring). On the contrary, the apportionment under attack was recently adopted in a State-wide referendum by substantial majorities in every county, including the counties which plaintiffs claim to be the victims of unconstitutional discrimination. The voters adopted the current apportionment not only as an improvement upon the *status quo* but in preference to an alternative measure which would have provided equal representation *per capita* in both branches of the legislature. The State-wide vote was 305,700 to 172,725 in favor of the present apportionment (R. 78). The votes in the most populous counties, all of which favored the current plan even though most of them suffer substantial underrepresentation in the State Senate, were as follows (R. 76–78):

Counties	Amendment 7		Amendment 8	
	For	Against	For	Against
Adams	14740	10771	11277	13843
Arapahoe	18103	12351	13576	16446
Boulder	12654	9636	8524	13311
Denver	75877	61183	55499	76208
El Paso	17480	11509	9175	19068
Jefferson	24815	17597	20229	21217
Larimer	10729	4251	3530	10804
Pueblo	14591	11555	7930	17820
Weld	10914	5017	2871	12917

The usual rule is that rights under the equal protection clause are "personal" rights. *Shelley* v. *Kraemer*, 334 U.S. 1, 22; *Sweatt* v. *Painter*, 339 U.S. 629, 635; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 351; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, 161–162. The right of one individual cannot ordinarily be waived by others similarly situated or even by a majority of a homogeneous group. Thus, in *McCabe* v. *Atchison, T. & S. F. Ry. Co., supra*, 235 U.S. at 161–162, this Court rejected the argument that the limited demand by Negroes justified the State in permitting the furnishing of sleeping car, dining and chair car accommodations exclusively for white persons. And in *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 351, this Court held that the State of Missouri was bound to furnish the Negro plaintiff within its borders "facilities for legal education substantially equal to those which the State there afforded for persons of the white race, *whether or not other negroes sought the same opportunity*" (emphasis added). See also *Law* v. *Mayor and City Council of Baltimore*, 78 F. Supp. 346, 350 (D. Md.).

The general principle seems plainly applicable to the right to vote. If citizens of Mexican descent were barred from voting in Arizona, the right of an individual to relief could not be defeated by showing that a majority of the citizens of Mexican descent supported the discrimination. And two district courts have said that the right to equal protection in a legislative apportionment is also "personal." See *Sincock* v. *Duffy*, 215 F. Supp. 169, 184 (D. Del.), pending on appeal *sub nom. Roman* v. *Sincock*, No.

307, this Term; *Baker* v. *Carr*, 206 F. Supp. 341, 348 (M.D. Tenn.).

It seems apparent, however that the problem of legislative apportionment has a distinctive aspect where the apportionment is favored by the voters of every geographical unit, including those alleged to be the victims of unconstitutional discrimination. There is no escape from treating the voters in a single representative district uniformly. It is impossible to give one man a different measure of representation than another in the same district. One voter cannot assert his right to equal representation while the others waive it in any meaningful sense. To put the point another way, every action to enforce a claimed constitutional right to greater *per capita* representation is a class action necessarily affecting all the voters in the district. Any relief granted to those who request it in the courts will unavoidably be forced upon those who rejected it at the polls. Under such circumstances the will of those similarly situated and necessarily affected would seem to be a factor that equity should take into account in deciding whether to intervene or stay its hand.

In the present case the weight of this factor must be discounted to some degree because the referendum did not present a single clear-cut choice between the challenged plan and equal representation *per capita*. The real choice was between Amendment No. 7, which was approved, and Amendment No. 8, which was rejected. There were three differences:

(1) Amendment No. 7 gave rural counties greater, and the urban and suburban counties less, representa-

tion in the Senate than Amendment No. 8, which called for apportioning seats in both houses in proportion to population.

(2) Amendment No. 7 itself apportioned the seats among the counties and multi-county districts, leaving only the task of dividing the multi-district counties to the legislature, whereas Amendment No. 8 delegated the entire task of laying out both Senate and House districts to a three-member Commission.

(3) Amendment No. 7 required the establishment of individual districts within the counties so that each representative district would choose one representative and each senatorial district one senator. Amendment No. 8 would have made little change in the mandate of the State constitution (Article V, Section 47) that "[n]o county shall be divided in the formation of a senatorial or representative district." It would have retained that provision for senatorial districts, and would have required that a proposal to divide a county into representative subdistricts be placed on the ballot by initiative petition and that a majority of the county's voters approve in a general election the exact method of subdivision and the exact apportionment of representatives among the subdistricts and the county at large (R. 184; 219 F. Supp. at 934–935).

It is impossible to say how far the vote in any county was swayed by any single factor. The second and third differences raised substantial issues. The third issue, involving the division of counties so as to reduce the number of names on the ballot, would have

been of special concern in the most populous counties. Perhaps it was what tipped the scale in favor of Amendment No. 7 in those counties, rather than any recognition of the virtues of weighting the apportionment of the State Senate in favor of the less populous counties.[7] Perhaps not. All one can say with assurance is that the voters of each county preferred the weighted representation plus the other features of Amendment No. 7 over both Amendment No. 8 and the *status quo*.

Equity, in an appropriate case, may also take into account the opportunities for revision of an apportionment at the polls. See Mr. Justice Clark's concurring

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[7] The record indicates that this was an important part of Amendment No. 7. One of the principal purposes of the intervenors in sponsoring Amendment No. 7 was to do away with the requirement that no county be subdivided in forming a district. According to testimony presented by the intervenors, the result of that requirement was that (R. 417): "* * * in the larger counties such as Denver * * * there are so many candidates on the ballot it is impossible for the average voter to know more than just a few of whom he is voting for."

The requirement meant that in the City and County of Denver each citizen was represented "by seventeen representatives and eight senators" (R. 417-418)—a situation which amounted "to a lottery" (R. 418). For instance, in Denver if the names of the candidates "* * * begin with A, B, and C, if they get on the top line of the voting machine in the primary election and if they have some organized groups supporting them, they are almost certain to be elected. Seven out of our eight senators or as I recall it, from Denver have names beginning with A, B, or C" (R. 420). Thus one of the purposes of Amendment No. 7, but not of Amendment No. 8, was "to stop this situation of where a voter in Denver is confronted with a ballot of at least thirty-four candidates, seventeen Republican and seventeen Democrat * * *" (R. 426).

opinion in *Baker* v. *Carr*, 369 U.S. 186, 258–259. The bare opportunity to vote to summon a constitutional convention is an inadequate remedy, especially where seats in the convention will be apportioned in a discriminatory fashion. Too many cross-currents and uncertainties affect the plebiscite and the voter's opportunity to obtain relief for this to count as a practical avenue of political redress.

The initiative and referendum sometimes offer more feasible relief, although the variations in State laws and political practices as well as the character of any discrimination call for case-by-case analysis. In Colorado this avenue for expressing the majority's will seems readily available both in theory and through familiar use. The Colorado Constitution provides for the initiative and referendum of both "laws and amendments to the Constitution." Colo. Const., Art. V, § 1. Both may be adopted by a simple majority. A measure may be initiated when proposed by 8 percent of those who voted for Secretary of State in the last prior election. *Ibid.*; 1953 Colo. Rev. Stat. 70–1–5. In 1960 there were 578,186 such voters in Colorado, so that 46,255 signatures would be required. This is a comparatively modest number. Colorado has traditionally made free use of the initiative and referendum. While it is apparent that obtaining such signatures and organizing the necessary political support to carry an amendment in an election requires time, energy and considerable expense,[8] Colorado's avenues of political relief appear both open and direct.

[8] It has been argued that reapportionment cases concern the right of a single voter and that the initiative and referendum

The availability of potential political remedies is never enough, however, standing alone, to warrant the delay or denial of judicial relief. Manifestly, there is no reason to consider political remedies where the constitutional claim is that a minority has been subject to arbitrary discrimination; the purpose of constitutional guarantees is to protect minorities against injustices through the political process. One must remember, too, that there will usually be uncertainty whether the victims of any particular discrimination are a majority or minority. Ordinarily it would accomplish little to put the victims to the burden of proving that they are a minority, nor can one ever be sure just why an initiated measure is defeated. These circumstances greatly lessen the value of the initiative and referendum in all ordinary cases, but they do not wholly dispose of the argument here. In the instant case appellees' argument is that the counties in which plaintiffs vote are not the victims of discrimination by a minority through distortion of representative government, or even by a majority, but that they themselves joined in adopting the unequal apportionment by popular consent expressed in a majority vote in each county in the 1962 referendum (see p. 25 above). The

is no redress to the complaining individual because of both the expense and the difficulties of promoting a political movement. See Judge Doyle dissenting (R. 198–199; 219 F. Supp. at 942); *League of Nebraska Municipalities* v. *Marsh*, 209 F. Supp. 189, 193 (D. Neb.). The question is, however, whether the individual's right to equal protection in legislative apportionment should be regarded as identical with all other individual constitutional rights. See pp. 26–27 above.

claim may be questionable but, in appraising the desirability of judicial intervention, it would seem relevant that it may be disproved, if untrue, through a relatively straightforward course of political action.

The final factor taken into account should be the character of the plaintiffs' claim, especially whether the right is clear and the wrong is great. Common sense requires greater alacrity in granting equitable relief against a manifest wrong of great magnitude than in a doubtful case of comparatively little injury.

One of the grounds for asserted relief appears to be the claim that the Equal Protection Clause requires seats in both houses of a State legislature to be apportioned as nearly as practicable in proportion to population. The argument would exclude from consideration the claims of geography, history, and established political subdivisions, such as our briefs in the prior cases assumed *arguendo* to be constitutionally permissible considerations. The Government is not prepared to reject the rule of *per capita* equality, but it does not presently urge it. Such an interpretation would press the Equal Protection Clause to an extreme, as applied to State legislative apportionment, would require radical changes in three-quarters of the State governments, and would eliminate the opportunities for local variation. On the other hand, to reject the interpretation at this early stage of the development under *Baker* v. *Carr*, would prematurely close an important line of constitutional evolution.

If complainants' case depends upon requiring *per capita* apportionment in both houses of a State legislature, the wrong, if any, is not very great. Any gross malapportionment, resulting in more serious injury, can be challenged under the principles laid down in the Government's briefs in prior cases (assuming they are embraced by the Court). Consequently, taking into account all the foregoing factors, the Government would conclude, if the Colorado apportionment were not invalid under the propositions advanced in the prior cases, that the complainants might appropriately be remitted to the political process and any remedies at law.

In the Government's view, however, the plaintiffs have made out a case under the principle that disparities in *per capita* representation may be so gross in relation to any otherwise permissible objectives of the classification as to be arbitrary and capricious under settled constitutional doctrine. The validity of that general proposition will be determined in other pending apportionment cases. Insofar as appellants' challenge to the Colorado apportionment depends upon it, the Court should also determine the merits of the present controversy for however close the case may be on this point as a matter of degree, this challenge breaks no new ground and essentially the same kind of question of degree would have to be decided in determining whether plaintiffs' injury, if any, was sufficient to warrant equitable relief.

II

THE INEQUALITIES IN PER CAPITA REPRESENTATION IN THE COLORADO LEGISLATURE ARE SO SERIOUS AND THE CONTROLLING MINORITY SO SMALL AS TO DENY APPELLANTS EQUAL PROTECTION OF THE LAWS

The Equal Protection Clause of the Fourteenth Amendment prohibits arbitrary and capricious discrimination among voters in the apportionment of seats in a State legislature. *Baker* v. *Carr*, 369 U.S. 186; cf. *Gray* v. *Sanders*, 372 U.S. 368. In its briefs in previous reapportionment cases the Government assumed *arguendo* that the Equal Protection Clause as applied to State apportionment, unlike Article I, Section 2, as applied to Congressional districting,* does not require *per capita* equality. The Government makes the same assumption in the instant case, both because it is satisfied that the apportionment is invalid upon narrower grounds and because, if it is not, the complaint may be dismissed in the exercise of equitable discretion without reaching the question whether *per capita* equality is required. We continue to believe, however, that whatever leeway the Constitution may leave, the only truly fair and democratic method of apportionment is in proportion to population.

Our earlier briefs submitted an analysis of the Equal Protection Clause, consistent with the *arguendo* assumption, that rested upon two principles. First, the basic standard of comparison, in applying the

* See *Wesberry* v. *Sanders*, No. 22, this Term, decided February 17, 1964.

Equal Protection Clause, is the representation of qualified voters *per capita*. Second, discrimination in the *per capita* representation accorded any group of voters is unconstitutional unless it has a rational basis in objectives relevant to the electoral process. The latter principle is, of course, the traditional rule in all kinds of cases under the Equal Protection Clause, although greater justification is required for discrimination in personal or political rights. See, *e.g.*, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79; *Goesaert* v. *Cleary*, 335 U.S. 464, 466; *Skinner* v. *Oklahoma*, 316 U.S. 535, 536, 541; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370. Particularizing the latter principle we developed three corollaries:

(a) The Equal Protection Clause is violated by an apportionment that creates gross inequalities in representation without rhyme or reason. The Colorado apportionment survives this test. It is not the kind of crazy-quilt that results from long legislative inaction in the face of drastic shifts in population. *E.g.*, *Baker* v. *Carr*, 369 U.S. 186. Nor does it involve a current but wholly irrational political compromise based upon power in disregard of reason. *E.g.*, *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term; *Roman* v. *Sincock*, No. 307, this Term. Although the Colorado apportionment cannot be rationalized according to any single formula, a combination of intelligible explanations is advanced, which makes it impossible to say that there is no rhyme or reason.

(b) The Equal Protection Clause is violated by a discriminatory apportionment based upon criteria which are contrary to express constitutional limita-

tions, or otherwise invidious, or irrelevant to any permissible objective of legislative apportionment. We distinguished between (1) bases of apportionment which serve the purpose of making representative government work better, even though a collateral consequence may be *per capita* inequalities, and (2) methods of apportionment whose only function is to create classes of voters with political power disproportionate to their number, as by giving farmers more representation than wage earners, city dwellers more than suburbanites, shipping interests more representation than manufacturing communities, or Protestants more than Jews. Some of the latter distinctions are permissible in taxation or regulatory legislation but not, we submit, in respect to political rights. The Fourteenth Amendment guarantees the rich and the poor, the banker and the wage earner, the farmer and the city dweller, like the Catholic and the Protestant, equality before the law defining the opportunities for participation in self-government. For fuller discussion, see Brief for the United States in *Roman* v. *Sincock*, No. 307, this Term, pp. 32–43.

The foregoing rule is relevant in the present case but not decisive standing alone. Counsel for appellees, like the draftsmen of Amendment No. 7 and its proponents in the referendum, invoke several justifications which we regard as impermissible, and the district court gave them weight. Thus, we regard as constitutionally irrelevant the entire argument about balancing the political power of the four geographically and economically distinct sections into which the State is divided so as to give the populous

eastern slope communities less representation than their population would warrant. Nor would the possession or lack of natural resources such as water seem to be a justification for weighting the *per capita* vote. Such considerations, unlike the size or historical coherence of a constituency, have nothing to do with the functioning of the legislature as a deliberative, representative body.

But while such considerations do not furnish justification for the *per capita* discrimination in the Colorado legislature, their role in the adoption of the amendment seems indecisive. A court, upon judicial review, will not scrutinize the motives of the legislature. *E.g., Doyle* v. *Continental Ins. Co.*, 94 U.S. 535; *Arizona* v. *California*, 283 U.S. 423, 455, and the cases therein cited. The rule would seem even more clearly applicable to measures adopted in a State-wide referendum. If there are proper considerations that might justify the *per capita* inequalities, the Court will not inquire further into motive. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 425–426.[10] In the present case other permissible objectives are assigned as justification—the importance of county lines, historical as-

[10] In *Gomillion* v. *Lightfoot*, 364 U.S. 339, the allegations, which were taken as true upon motion to dismiss, compelled the conclusion that the legislation was solely concerned with the racial segregation of voters.

sociations, the need to keep Senate districts compact in area, difficulties of communication, etc. Consequently, although the rule defining permissible objectives is relevant in delimiting the focus, it is not dispositive.

(c) The present case comes down to the question whether the permissible objectives can reasonably be deemed adequate to justify the inequalities in *per capita* representation resulting from Amendment No. 7. Circumstances or objectives that might, under our basic assumption, furnish a reasonable basis for small inequalities are utterly inadequate, even whimsical, when offered as support for grosser discrimination. Accordingly, we turn to the facts of the instant case. We show first that the equal *per capita* representation in Colorado's lower house is not alone enough to satisfy the requirements of equal protection. We then show that the discrimination in *per capita* representation in the Senate, even when weighed against every available justification, is too great to satisfy the requirements of equal protection in a matter so vital as participation in the processes of self-government.

A. THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE APPLY TO BOTH HOUSES OF A BICAMERAL LEGISLATURE

The court below apparently assumed without discussion that the mere fact that seats in the lower house of the Colorado legislature were allocated among the counties in accordance with population did not carry a license to disregard the requirements of the Equal Protection Clause in apportioning seats in the State Senate. That view is plainly correct. The constitutional barrier against arbitrary and capricious discrimination applies to both houses of the legislature

considered together. The weight of authority since *Baker* v. *Carr* holds that the question whether an apportionment violates the Equal Protection Clause cannot be answered without taking into account both houses of a bicameral legislature. *Sims* v. *Frink*, 208 F. Supp. 431, 439–440 (M. D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Sobel* v. *Adams*, 208 F. Supp. 316, 323–324 (S.D. Fla.); *Baker* v. *Carr*, 206 F. Supp. 341 (M. D. Tenn.) (after remand by this Court); *Nolan* v. *Rhodes*, 218 F. Supp. 953 (S.D. Ohio; *Sweeney* v. *Notte*, 183 A. 2d 296, 302 (R.I. Sup. Ct.). And arbitrary and capricious discrimination does not become unobjectionable because it affects only one branch of the legislature.

It seems plain, for example, that a *per capita* apportionment of seats in a State House of Representatives would not save a crazy-quilt distribution of seats in the Senate, lacking rhyme or reason and resulting in gross inequalities in *per capita* representation. Similarly, a Senate apportionment that weighted the votes of some citizens, as opposed to others, upon the ground that they were farmers rather that city dwellers, or Catholics rather than Protestants, could not be excused on the ground that the discrimination was not carried into the lower house.

This is not to say that the apportionment of seats in each house must be judged without relation to the other. The ultimate question is whether the complainants have been deprived of equal representation in the legislature without rational justification, and that depends upon their representation in one house as

well as the other. If the seats in one house are apportioned substantially *per capita,* there may be room for greater variation in the other chamber than if the inequalities were found in both houses, provided, of course, that the variation rests upon a rational justification.

In the *amicus* brief filed by New Jersey and a number of other States in *Maryland Committee for Fair Representation* v. *Tawes,* No. 29, this Term, the argument is advanced that the analogy of the Congress of the United States supports disregard for *per capita* representation in a State Senate if the lower house is apportioned in accordance with population. The federal analogy is inapplicable to the States because it rested upon the historic compromise by which 13 sovereign States agreed to form a federal Union. The composition of the Congress is a compromise between two theories of representation—representation of the sovereign States as equals and representation of the people. The counties in Colorado, as in the other States, are merely governmental subdivisions of the State; they have never been sovereign and independent. The federal analogy is, therefore, as inapplicable to State legislatures as the electoral college is to the election of State officials. See *Gray* v. *Sanders,* 372 U.S. 368, 378. For a more complete discussion of the inappropriateness of the so-called federal analogy, see Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes,* No. 29, this Term, pp. 73–82, and the detailed Appendix to that brief.

The federal analogy would be of no avail to appellees even if it did support the representation of counties, as such, in the upper branch of a State Legislature. The Colorado Senate is not made up of representatives of the counties. Today, as in the past, counties have been grouped into senate districts, and the grouping has been changed from time to time. Some counties are assigned two or more senators chosen from the geographical districts into which the counties are divided. The system bears no resemblance to the federal structure quite apart from the historical and theoretical differences.

In short, the net effect of the equal *per capita* representation in the Colorado House of Representatives is two-fold. First, the inequalities in representation in the Senate are tempered by the equality in the lower branch, a consideration which has undeniable importance where the critical issue is whether the inequalities are so gross as to be arbitrary and capricious in relation to the alleged justification. Second, while the discrimination in the State Senate will enable a minority of the people—in Colorado a minority of possibly less than one-third—to block legislation desired by the majority of the people, the *per capita* representation in the House will prevent a minority from imposing its will upon the majority except as it can force a compromise as the price of action. However, the latter point would seem to have diminishing importance as an argument for appellees in an age of increasing affirmative governmental responsibility for promoting the public welfare.

B. THE DISCRIMINATION IN PER CAPITA REPRESENTATION RESULTING FROM THE GROSS MALAPPORTIONMENT OF THE SENATE HAS NO RATIONAL RELATION TO PERMISSIBLE OBJECTIVES OF LEGISLATIVE APPORTIONMENT

There are undeniably grave inequalities in *per capita* representation in the Colorado Senate. Six districts have more than twice their fair *per capita* share of representation. The 127,520 people of Jefferson County have less than one-third the *per capita* representation of three other senatorial districts (Districts 23, 24, and 34), comprising 12 counties.[11] The people of El Paso County, with a population of 143,742, have less than one-third the representation of the people of seven other senatorial districts. The imbalance also prejudices Denver and Pueblo. The following table shows the relationship between the most underrepresented and overrepresented districts together with other typical districts:

[11] The computations in this portion of our brief, as elsewhere, are all derived from the basic figures appearing in Appendix C to the opinion of the district court (R. 186–189).

The district numbers are taken from House Bill 65, which implemented Amendment No. 7. They are the same numbers used in the opinion of the district court. The most convenient maps of the senatorial districts are found on the inside of the back and front covers of the separately bound report prepared by the Denver Research Institute, University of Denver, and admitted into evidence as Def. Ex. D. It should be noted, however, that the numbering of the districts on those maps does not correspond to the numbering in House Bill 65. Wherever practicable, therefore, we shall indicate the names of the counties composing a district.

Senatorial district	Total population (1960)	Number of Senators	Population per Senator	Ratio to most underrepresented district
El Paso	143,742	2	71,871	1.00
Jefferson	127,520	2	63,760	1.13
Denver	493,887	8	61,736	1.16
Adams	120,296	2	60,148	1.19
Pueblo	118,707	2	59,353	1.21
Arapahoe	113,426	2	56,713	1.27
Yuma, *et al*	36,729	1	36,729	1.96
Otero, Crowley	28,106	1	28,106	2.56
Saguache, *et al*	24,485	1	24,485	2.94
Fremont, Custer	21,501	1	21,501	3.34
Delta, *et al*	21,287	1	21,287	3.38
Kit Carson, *et al*	21,189	1	21,189	3.39
Chaffee, *et al*	20,909	1	20,909	3.44
Las Animas	19,983	1	19,983	3.60
State total	1,753,947	39	44,973	1.59

The consequence is a striking departure from the democratic principle of majority rule. A numerical majority of the senators may come from counties containing only 33.2 percent of the population—less than one-third of the people.[12] The Eastern Slope Region, with 75 percent of the population, has only 23 out of 39 senators. Denver and the three adjacent counties (Jefferson, Arapahoe, and Adams) have 49 percent of the population but only 14 out of 39 senators—a mere 36 percent. Denver and the three adjacent counties, plus the two other metropolitan areas, Pueblo and Colorado Springs, have 63.7 percent of the State's population but they elect only 18 of the

[12] This figure conflicts with the figure of 36.28 percent given by the majority of the court below (R. 175; 219 F. Supp. at 931). The court arrived at its figure by taking Boulder County out of the Denver Metropolitan Area and adding it to the non-metropolitan areas (R. 175). The figure so obtained, however, does not reflect the smallest number of people capable of electing a majority. The proper figure is the ratio of the number of people in the 20 districts with the lowest population to the total population.

State's 39 senators, less than a majority, although they contain almost two-thirds of the people.

The gross divergencies measured by the 1960 census are widening and will grow still wider. The underrepresented districts in the Denver, Colorado Springs, and Pueblo metropolitan areas have continuously gained population (Def. Ex. D, Part II–2). The population of Arapahoe County has jumped from 32,150 in 1940 to 52,125 in 1950 and to 113,426 in 1960. The population of Jefferson County was 30,725 in 1940, 55,687 in 1950, and 127,520 in 1960. El Paso County (the Colorado Springs Metropolitan Area) had 54,025 people in 1940, 74,523 in 1950, and 143,742 in 1960 (*ibid.*). The districts in south central Colorado, which include the most overrepresented district in the State (Las Animas) and which are generally among the most favored, have tended continuously to decline in population in recent years (Def. Ex. D, Part II–1). Las Animas County, for example, had a population of 32,369 in 1940, 25,902 in 1950, and 19,983 in 1960 (*ibid.*).

The trend is obviously progressive—a fact reflected in the population estimates of the Colorado State Planning Division for January 1964. The estimated population of Colorado for that date is 1,950,150. The 20 smallest districts, with a majority of the senators, now have 31.3 percent of the population, as compared with 33.2 percent in 1960. Denver and its suburbs, with just over 50 percent of the population, have 14 senators out of 39. The Denver metropolitan area (which includes Boulder), with well over a majority of the State's population (1,069,000 of 1,950,150) has 16 senators. The six largest coun-

ties, which now have 67 percent of the population (as compared with 63.7 percent in 1960), still have only 18 of the 39 senators.

The *per capita* inequalities, measured by the 1960 census but still growing, are manifestly sufficient to make a *prima facie* case of invidious discrimination even though seats in the lower house of the Colorado legislature are divided in proportion to population.

The court below examined a number of justifications advanced by appellees and found that they furnished a rational basis for the *per capita* discrimination. Others were advanced in the testimony. We may lay to one side at the outset justifications that are invidious or irrelevant. As we have shown in earlier cases, it is not the function of an apportionment to balance off the economic interests of the several regions in a State by assigning them purely arbitrary weight in the legislature disproportionate to the numbers of people affected. The mining, livestock, and agricultural interests are not entitled to extra votes merely because the urban majority would otherwise dominate the legislature.[13] Nor is it permissible to assign extra voting power to those who command natural resources;[14] a legislature must be made up or representatives of men and women, not of water. Since the underlying principles are thoroughly discussed in our briefs in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this

[13] See, *e.g.*, affidavit of Edwin C. Johnson (R. 144) ("It is obvious that if both houses of the legislature were on a straight head count basis, the Denver Metropolitan Area would absolutely dominate the State of Colorado").

[14] See, *e.g.*, *id.* (R. 148).

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Term, pp. 39–46, and *Roman* v. *Sincock*, No. 307, this Term, pp. 32–45, we need not repeat them here.

Accordingly, we turn to the justifications assigned that are permissible in kind because their function is to make representative government work better, in the sense of making the legislature better informed, enabling the representatives to be more familiar with their districts and more accessible to their constituents, preserving a measure of stability, or promoting effective political organization, all as distinguished from the mere creation of favored classes of voters with preferred political rights.

Chief among the permissible objectives invoked in the present case is the desire to keep the Senate small enough in numbers to be a truly deliberative body while at the same time making the Senate districts small enough in area to enable each senator to have first-hand knowledge of his entire district and to maintain close contact with his constituents. In a mountainous area—and much of Colorado fits that description—accessibility is affected by the configuration as well as the compactness of a district. A second objective, apparently, was to avoid breaking up any county in order to combine part with another county in forming a multi-county district. County government is important in Colorado (R. 149), and county political organizations doubtless contribute both to a senator's knowledge of the needs and desires of his district and also to the operation of the electoral process as a means of reflecting the will of the electorate. Third, it is a permissible objective of apportionment, which may possibly be rele-

vant in Colorado, to assure some representation of special localities whose needs and problems might pass unnoticed if the districts were drawn solely to achieve *per capita* equality. Nor would we dismiss out of hand the relevance of a purpose to avoid district lines that might submerge the needs and wishes of portions of the electorate by regularly grouping them in districts where they will be outnumbered by voters with wholly different interests. Since districting is a method of giving a voice to putative minorities, community of interest would seem to be a relevant factor in drawing district lines.

Each of these considerations gives some support to a departure from strict *per capita* representation in Colorado but neither singly nor altogether can they make rational disparities of more than 3 to 1 which may give control of the Senate to senators elected by less than a third of the people. This is true for two reasons.

First, the discrimination is not reasonably required to achieve the foregoing objectives. The record makes it apparent that the same objectives could be substantially achieved without creating so much inequality. The most overrepresented district is District 23, Las Animas County, which with one Senator for 19,983 people has more than twice the proper ratio. Two other districts in the South Central Region, District 30 (consisting of Huerfano, Costilla, and Alamosa Counties) and District 31 (consisting of Saguache, Mineral, Rio Grande, and Conejos Counties) also have twice their proper representation. One representative could be freed by abolishing Dis-

trict 30 and putting Huerfano County in District 23 with Las Animas, to which it is already linked in a single Judicial District, and by putting Alamosa and Costilla Counties in District 31. District 23 would still cover only 6,378 square miles in relatively open country. District 31 would cover 8,202 square miles but would be by no means the largest district in the State. Furthermore, District 14 is now split by a mountain range crossed by only one highway, whereas the allocation of Huerfano County to District 23 on the east side of the range and of Alamosa and Costilla Counties to District 31 to the west of the range would allocate each to an area to which it is linked by the highway system. The population of each of the enlarged districts would still be well below the ratio. One seat would be freed to allocate to El Paso County, the most underrepresented in the State, which could then have three senators instead of two, each of whom would still represent slightly more than the ideal ratio.

A second seat could be freed by combining Districts 24 [15] and 25,[16] both of which are already grossly overrepresented. Combined, their population would still be less than the ideal ratio. The area of the combined district would be 7,461 square miles, possibly somewhat larger than ideal but not appreciably out of line with other Colorado districts. District 29 in the northwest corner of Colorado embraces 13,853 square miles and District 34 in the eastern region embraces 10,191

[15] District 24 consists of Chaffee, Park, Gilpin, Clear Creek, Douglas, and Teller Counties.

[16] District 25 is composed of Fremont and Custer Counties.

square miles. Communication in the combined district would be easier than in many mountainous regions for most of it is a high plateau with roads running north and south as well as east and west. Both of the existing districts are classified by appellees as belonging to the western region. They obviously share many common characteristics. The Senate seat freed by the combination could be assigned to Denver County, thus giving its citizens nine senators for 493,887 people, much closer to the ideal ratio of one senator for 45,000 people.

These two slight changes, which sacrifice none of the alleged objectives save the invidious purpose to downgrade metropolitan voters, would substantially lessen the discrimination. The ratio between the most overrepresented district and the most underrepresented would then be reduced from 3.6 to 1 to 3 to 1.[17] It would take almost two-fifths instead of less than one-third of the people to elect a majority of the Senate.

The conclusion that serious discrimination is hardly necessary to achieve the objectives of following county lines while keeping the Senate small in numbers and the districts convenient in size can also be demonstrated by examining still another alternative. We have set forth in Appendix B an illustrative apportionment which does not subdivide any county and creates no district with an area as great as 10,000 square miles, but which eliminates so much of the

[17] District 34 (consisting of Kit Carson, Cheyenne, Lincoln, Kiowa, and Elbert Counties) would become the most overrepresented district and Districts 21 and 22 the most underrepresented.

existing discrimination that it would take ~~at least~~ 45 percent of the population to elect a numerical majority of the Senate and all of the districts except one would have at least three-fourths of the ideal ratio. Senatorial districts with an area of less than 10,000 square miles cannot be judged excessively large even by Colorado's own standards. The largest existing district is District 29, which has an area of 13,853 square miles, and District 34 covers 10,194 square miles. The illustration contains no district as large as these. In addition to reducing the inequalities to the point where the smallest statistical majority of the State Senate would be chosen by ~~almost~~ 45 percent of the people, the illustration would also eliminate all ratios of overrepresentation to underrepresentation in excess of 1.7 to 1 (excepting one district that could not be enlarged without covering a very large area). It would give the three metropolitan areas (Greater Denver, including Boulder, Colorado Springs, and El Paso), which contain 67.9 percent of the population, 64.1 percent instead of only 51.3 percent of the Senate seats.

We recognize that it is not for the courts to choose one apportionment as preferable to another either because it provides greater *per capita* equality or because it approaches closer to some other ideal. Once the requirements of equal protection are satisfied, the choice is for the legislature. We cite possible revisions merely to show that there is no rational relationship between the discrimination resulting from the present apportionment and the only relevant legisla-

tive purposes cited to sustain it. Minor differences will not justify gross discrimination in a matter so fundamental as legislative representation. Inequality of *per capita* representation cannot be justified even by a permissible objective of legislative apportionment if the objective can be satisfied without sacrificing the principle of *per capita* equality. See Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes,* No. 29, this Term, pp. 41–42. By the same token, a permissible objective which can be satisfied by a small departure from *per capita* equality does not furnish a reasonable basis for a larger inequality. Conversely, the larger departure, even allowing room for legislative judgment, cannot be termed rational in terms of the objective advanced, for it would be a classification of people in a way that unnecessarily abridges the value of the right to vote. *Wesberry* v. *Sanders,* No. 22, this Term, decided February 17, 1964. The illustrations given above show that the departure goes beyond anything reasonably necessary to accomplish constitutional purposes in the present case.

A second independently sufficient reason for reversing the judgment below is that it attaches excessive weight to geographical considerations and the supposed desirability of following county lines, and too little value to the principles of equality and majority rule. Both the proponents of the current apportionment and the court below were heavily influenced, as we have seen (pp. 45–46, above), by such invidious con-

siderations as the desire to weight representation in favor of rural areas and to balance economic interests, not to mention the evident political purpose of preserving all the seats of incumbent senators. While such motives do not invalidate the apportionment if the discrimination is not otherwise arbitrary and capricious, they do show that both the appellees' argument and the district court's determination that the plan was "rational" resulted largely from their use of constitutionally irrelevant factors rather than their "arbitrariness" in striking the balance. When the invidious and irrelevant considerations are stripped away and only constitutionally permissible functions of apportionment are weighed in the balance, it becomes evident that the discrimination is arbitrary and capricious.

The geographical size of districts is far less important today, even in a large State like Colorado, than earlier in our history. Automobiles and modern highways make it possible to cover a district in much less time than even a generation ago. More roads are kept open in winter. Television, radio, and other methods of mass communication enable the representative to reach his constituents with relative ease; they gather and disseminate information that formerly could be acquired only by word of mouth. It helps to put the problem of area in perspective, therefore, to recall that as long ago as 1909 Colorado had one senatorial district covering 12,336 square miles and two others covering 11,063 and 9,232 square miles, respectively. And under the 1876 apportionment, Colorado had three Senate districts larger than any of

those at present; they covered 17,534, 15,803, and 15,461 square miles, respectively.

The inferences to be drawn from the size of Colorado's judicial districts also temper the force of the arguments based upon size and accessibility. Some are as large or larger than any senatorial district, although served by only one or two judges. They cover areas on both sides of mountain ranges, including in one instance the continental divide. See 1953 Colo. Rev. Stat. 37–3–2 to 37–3–17. Obviously, Colorado does not consider mountains and mountain barriers as crucial in establishing governmental units; today they are seldom serious barriers to effective communications.

The importance of county boundaries has also been exaggerated. For many years Colorado repeatedly changed the boundary lines, adding and subtracting large areas. See Hafen, *The Counties of Colorado: A History of Their Creation and the Origin of Their Names,* VIII The Colorado Magazine (March 1931), pp. 48–60. Still more important, the gross discrimination in *per capita* representation could be eliminated without attaching part of any county to an area in any other county to form a single district (see pp. 47–50 above).

The court below also gave weight to the fact that the current senate districts conform to "prior representation districts" (R. 176–177). This is but a way of noting what might be described more bluntly as a decision not to abolish the seat of any incumbent senator even at the cost of serious *per capita* discrimination. A senate district does not have independent

political or historical significance, apart from the fact that it is the geographical area from which senators previously have been chosen. While the abrupt revision of established district lines might be a relevant consideration all other things being equal, it can be given no substantial significance without accepting any discrimination that has previously existed. The shortcomings of the past cannot be the measure of current constitutional responsibilities. History may sometimes explain gross disparities in representation between the senatorial districts; it can never justify them. See the dissenting opinion of Judge Doyle below (R. 198; 219 F. Supp. at 942); *Butterworth* v. *Dempsey*, D. Conn., Civil Action No. 9571, decided February 10, 1964, slip op., p. 17 ("the equal protection clause is not concerned with desires to perpetuate * * * historical anomalies"); *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga.).[18]

The court below, like appellees here, also gave too little weight to the basic right to an equal voice in

[18] The intervenors attempted to show at the trial that there were a large number of transients in populated areas such as El Paso County, where the Air Force Academy, Fort Carson, Ent Air Force Base, and NORAD are located (R. 633) and Denver, which is the site of the State government, Lowry Air Force Base, and a large number of federal installations and defense plants (R. 654). Testimony also was adduced to the effect that the population of the county of Boulder was illusory because the census included the student population of Boulder, some 12,000 to 13,000 out of a total of 72,254 (R. 654). An exhibit introduced by the intervenors contained a tabulation of the registered voters and total population of each county of the State (Intervenors' Ex. D). This table showed that El Paso County had 56,501 registered voters out of a total population of 143,742, or approximately 39.3 percent,

representative government. The decisions of this Court make it clear that strong justification is re-

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compared with the State-wide average of 50.1 percent (*ibid.*).

The theory that Amendment No. 7 was designed to take into account the transient population of certain of the larger areas does not stand up under examination. First, military personnel, government employees, and students are not included within the categories of people disabled from voting in Colorado. 1953 Colo. Rev. Stat. 49–3–3. Although "[f]or the purpose of voting * * * no person shall be deemed to have gained a residence by reason of his presence * * * while in the civil or military service of the state, or of the United States, nor while a student at any institution of learning * * *" (Colo. Const., Art. VII, Sec. 4; 1953 Colo. Rev. Stat. 49–3–4), there was no evidence as to how many soldiers, students, or employees were, and how many were not, residents of the various counties and therefore entitled to vote there for that reason (R. 637).

Second, if the apportionment were based on the number of registered voters, Denver would have received more—not less—than its fair representation based on population. For notwithstanding its alleged "transient" population, the percentage of its population who were registered voters was 52 percent, exceeding the State-wide average of 50.1 percent (Intervenors' Ex. D).

Third, despite Boulder's allegedly "transient" student population, it was overrepresented, having two senators for a total population of 74,254 (inclusive of transients). The justification asserted was to provide for the fact that the population of Boulder was "greatly increasing." The population of Boulder County increased 55 percent from 1950 to 1960 (Def. Ex. D, Part II–2). Under the theory of the intervenors, this increase offset the transient nature of its student population, but much more startling rates of increase, such as Adams' 199 percent and Jefferson's 127 percent, were for some reason insufficient to justify an allowance for future growth.

Fourth, exclusion of the so-called transient population from the total population of the various districts will not explain the discrimination against the suburban counties of Adams, Arapahoe, and Jefferson. For all these reasons, the compelling inference is that the apportionment was not based on comparisons of total population less transients.

quired for any legislative classification affecting fundamental rights. See Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 65–71. And voting "is regarded as a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370. "No right is more precious in a free country that that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry* v. *Sanders*, No. 23, this Term, decided February 17, 1964, slip op., pp. 16–17.

The question (upon our basic assumption) is inescapably one of degree. Colorado assigns some valid functions to the classification which gives citizens in some counties greater *per capita* representation than citizens in others, but objectives that might furnish acceptable justification for one variation become so relatively insignificant as to leave the discrimination arbitrary and capricious when the inequalities are gross and wholly submerge the principle of majority rule. That was plainly the case in the Maryland litigation where the disparities ran as high as 6 to 1 in the House and 32 to 1 in the Senate and the two chambers could be controlled by numerical majorities chosen from districts containing only 36 percent and 14 percent of the people. See Brief for the United State in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 57–59.

It was plainly the case also in the Alabama litigation where, under the so-called "67-Senator Amendment," a numerical majority of the House could come from districts containing 42.4 percent of the people while the Senate could be controlled by senators from districts containing less than 20 percent of the people. See Brief for the United States in *Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term, pp. 20, 32. The apportionment in Delaware was still more discriminatory. See Brief for the United States in *Roman* v. *Sincock*, No. 307, this Term, pp. 15–16, 24–36. In New York the constitutional provisions concerning apportionment as applied to the 1960 census will permit a numerical majority of the House to be chosen by counties containing 37 percent of the population, and a numerical majority of the Senate to be elected by counties containing 38 percent of the people. See Brief for the United States in *WMCA, Inc.* v. *Simon*, No. 20, this Term, pp. 34–35.

Judged by this standard the present case is much closer than those which preceded it. The Colorado House, unlike the lower branch in any of the other cases, is apportioned among the counties as nearly as practicable in accordance with population. The Senate cannot be controlled by senators elected by less than 33.2 percent of the people—a much better ratio than in Maryland, Alabama, or Delaware even if one looks only to the Senate, and better than New York if both branches are taken into account. Affirmance here would not require approval of those apportionments, even apart from the other attacks

upon their validity;[19] nor would it cast doubt upon the basic principles we have advanced, for, accepting the principles, the outcome here still turns, as we have said, upon a question of degree.

While the question is admittedly close, the United States submits that three points should be decisive:

(1) The discrimination is sufficiently substantial to give 75 percent of the voters, living in the eastern slope region, less than half the *per capita* representation in the Colorado Senate which it grants the 25 percent of the voters living in other regions, and permits counties containing less than one-third of the people to elect a numerical majority of the Senate.

(2) The trend of population growth is constantly increasing the discrimination.

(3) The only relevant and non-invidious objectives could be substantially achieved without serious discrimination.

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[19] The New York, Maryland, Delaware, and Virginia apportionments are also attacked upon grounds not applicable to the present case. The same is true of some aspects of the apportionments in the Alabama cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court should be reversed.

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APPENDIX A

INITIATED AMENDMENT NO. 7

1962 COLO. GEN. ELECTION

SECTION 1. Sections 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed and new Sections 45, 46, 47 and 48 of Article V are adopted to read as follows:

"Section 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All districts shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

"Section 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

"Section 47. SENATE. The State shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now provided by 63–1–3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder and Jefferson. Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be.

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"Section 48. REVISION OF DISTRICTS. At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to conform to the requirements of Sections 45, 46 and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to or earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and representatives and the senatorial and representative districts of the general assembly shall be as provided by law."

INITIATED AMENDMENT NO. 8 (REJECTED BY THE VOTERS)

1962 COLO. GEN. ELECTION

Sections 45 and 47, Article V, of the Constitution of the State of Colorado, are hereby amended to read as follows:

"Section 45. APPORTIONMENT BY COMMISSION. (A) There shall be established a Commission for Legislative Apportionment composed of three members who shall be qualified electors of the State of Colorado, no more than two of whom shall be of the same political party, to serve for a term of eighteen months from the time of their appointment. One member shall be appointed by each of the following in this order: by the Attorney General prior to

June 1, by the Lieutenant Governor prior to June 15 and by the State Board of Education prior to July 1, of each year of appointment. The appointments shall be made prior to July 1, 1963, July 1, 1971, and July 1 of each tenth year thereafter.

"(B) It shall be the duty of the commission to delineate senatorial and representative districts and to revise and adjust the apportionment of senators and representatives among such districts. The commission shall certify to the Colorado Supreme Court the boundaries of the senatorial and representative districts and the reapportionment of senators and representatives on or before January 2, 1964; January 2, 1972, and January 2 of each tenth year thereafter.

"(C) If such delineation and apportionment conforms to the requirements of sections 45 through 47 of this article, the court shall affirm the same. If such delineation and apportionment does not conform to the said requirements or if for any reason whatever the same is not certified to the court, then the court shall delineate senatorial and representative districts and adjust the apportionment among such districts. The court shall rule on or before April 15 of each year set forth in paragraph (B) of this section, with such districting and apportionment to become effective on the date of the court's ruling. The court shall notify forthwith the secretary of state and the clerk of each county of its ruling.

"(D) The commission shall determine a strict population ratio for the senate and for the house by dividing the total state population as set forth in each decennial United States Census by the number of seats assigned to the senate and house, respectively. No legislative district shall contain a population per senator or representative of 33⅓% more or less than the strict population ratio, except mountainous senatorial dis-

tricts of more than 5,500 square miles, where the major portion of the district lies west of the 28th meridian of longitude west from Washington, D.C., but no such senatorial district shall contain a population of less than 50% of the strict population ratio.

"(E) It is the intent that sparsely populated areas shall have maximum representation within the limits set forth in paragraph (D) and that population per legislator in densely populated areas shall be as nearly equal as possible.

"(Section 47. SENATORIAL AND REPRESENTATIVE DISTRICTS. (A) Senatorial districts may consist of one county or two or more contiguous counties but no county shall be divided in the formation of a senatorial district.

"(B) Representative districts may consist of one county or two or more contiguous counties, except that any county which is apportioned two or more representatives may be divided into representative subdistricts; Provided, that, a majority of the voters of that county approve in a general election the exact method of subdivision and the exact apportionment of representatives among the subdistricts and the county at large.

"(C) Any proposal to divide a county into subdistricts shall be placed on the ballot only by initiative petition filed with the secretary of state according to the requirements set forth for statewide initiated measures in Article V, Section 1, of this constitution and statutes enacted thereunder; Provided, that, the requirements for the number of signatures and publication shall be determined for that county instead of for the state.

"(D) Subdistricting measures may be placed on the ballot at the general elections of 1966, 1974, and at the general elections held each tenth year thereafter and at no other times.

Any such measure shall take effect pursuant to the provisions of Article V, Section 1, of this constitution and shall remain in effect until repealed or revised by the people through another initiated measure, except that when the apportionment of representatives to any subdistricted county is increased or decreased by the commission for legislative apportionment, the commission may, subject to the review provided in Section 45, paragraph (C), of this article, amend the subdistricting in said county as necessary to conform to the new apportionment.

"(E) A candidate for representative in any subdistricted county need not reside in the subdistrict in which he is a candidate.

"(F) No part of any county may be combined with another county or part of another county in the formation of any senatorial or representative district."

Prior to the adoption of Amendment No. 7, 1953 Colo. Rev. Stat. 63–1–3, provided:

Senatorial districts.—The state of Colorado shall be divided into twenty-five senatorial districts, numbered and entitled to the number of senators, as follows:

The city and county of Denver shall constitute the first senatorial district and be entitled to eight senators.

The county of Pueblo shall constitute the second senatorial district and be entitled to two senators.

The county of El Paso shall constitute the third senatorial district and be entitled to two senators.

The county of Las Animas shall constitute the fourth senatorial district and be entitled to one senator.

The county of Boulder shall constitute the fifth senatorial district and be entitled to one senator.

The counties of Chaffee, Park, Gilpin, Clear Creek, Douglas and Teller shall constitute the sixth senatorial district and be entitled to one senator.

The county of Weld shall constitute the seventh senatorial district and be entitled to two senators.

The county of Jefferson shall constitute the eighth senatorial district and be entitled to one senator.

The counties of Fremont and Custer shall constitute the ninth senatorial district and be entitled to one senator.

The county of Larimer shall constitute the tenth senatorial district and be entitled to one senator.

The counties of Delta, Gunnison and Hinsdale shall constitute the eleventh senatorial district and be entitled to one senator.

The counties of Logan, Sedgwick and Phillips shall constitute the twelfth senatorial district and be entitled to one senator.

The counties of Rio Blanco, Moffat, Routt, Jackson and Grand shall constitute the thirteenth senatorial district and be entitled to one senator.

The counties of Huerfano, Costilla and Alamosa shall constitute the fourteenth senatorial district and be entitled to one senator.

The counties of Saguache, Mineral, Rio Grande and Conejos shall constitute the fifteenth senatorial district and be entitled to one senator.

The county of Mesa shall constitute the sixteenth senatorial district and be entitled to one senator.

The counties of Montrose, Ouray, San Miguel and Dolores shall constitute the seventeenth senatorial district and be entitled to one senator.

The counties of Kit Carson, Cheyenne, Lincoln and Kiowa shall constitute the eighteenth senatorial district and be entitled to one senator.

The counties of San Juan, Montezuma, La Plata and Archuleta shall constitute the nineteenth senatorial district and be entitled to one senator.

The counties of Yuma, Washington and Morgan shall constitute the twentieth senatorial district and be entitled to one senator.

The counties of Garfield, Summit, Eagle, Lake and Pitkin shall constitute the twenty-first senatorial district and be entitled to one senator.

The counties of Arapahoe and Elbert shall constitute the twenty-second senatorial district and be entitled to one senator.

The counties of Otero and Crowley shall constitute the twenty-third senatorial district and be entitled to one senator.

The county of Adams shall constitute the twenty-fourth senatorial district and be entitled to one senator.

The counties of Bent, Prowers and Baca shall constitute the twenty-fifth senatorial district and be entitled to one senator.

APPENDIX B

ALTERNATIVE APPORTIONMENT

District	Counties	Senators	Size (square miles)	Population
1	Rio Blanco	1	13,883	23,426
	Moffat			
	Routt			
	Jackson			
	Grand			
2	Pitkin	1	7,085	34,474
	Lake			
	Garfield			
	Eagle			
	Chaffee			
3	Gilpin	1	7,037	34,135
	Clear Creek			
	Park			
	Fremont			
	Teller			
	Douglas			
	Custer			
	Summit			
4	Mesa	1	3,334	30,715
5	Hinsdale	1	8,246	30,671
	Gunnison			
	Delta			
	Montrose			
	Ouray			
6	San Miguel	1	7,837	41,967
	Montezuma			
	San Juan			
	La Plata			
	Archuleta			
7	Saguache	1	9,782	40,571
	Mineral			
	Rio Grande			
	Alamosa			
	Conejos			
	Costilla			
	Huerfano			
8	Las Animas	1	8,999	39,589
	Prowers			
	Bent			

See footnote at end of table.

District	Counties	Senators	Size (square miles)	Population
9	Bent	1	9,368	47,696
	Otero			
	Crowley			
	Kiowa			
	Cheyenne			
	Kit Carson			
10	Morgan	1	8,287	36,585
	Washington			
	Elbert			
	Lincoln			
11	Logan	1	5,466	37,896
	Sedgwick			
	Phillips			
	Yuma			
12-13	Weld	2	4,033	72,344
14	Larimer	1	2,640	53,343
15-16	Boulder	2	738	74,254
17-18	Adams	2	1,250	120,296
19-29	Denver	11	73	493,887
30-31	Arapahoe	2	815	113,426
32-34	Jefferson	3	791	127,520
35-37	El Paso	3	2,159	143,742
38-39	Pueblo	2	2,414	118,707

[1] It is possible that Chaffee would not be considered readily accessible in a district composed otherwise of Pitkin, Lake, Garfield, and Eagle Counties. If this is correct, Summit should be transferred to district 2 and Chaffee moved to district 3. The disadvantage of this exchange is that district 3 would then have a population of almost 45,000, while district 2 would have only approximately 27,000 people instead of 37,000 and 34,000, respectively. This change, however, would not affect the fact that a majority of the legislature would be elected by districts with 45 percent of the people.

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